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IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1947**

**NO. 527**

**UNITED STATES OF AMERICA, Petitioner,**  
**v.**

**UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK, THE  
HONORABLE FRANCIS G. CAFFEY, Judge of  
the United States District Court for the Southern  
District of New York, and ALUMINUM COMPANY  
OF AMERICA, a Corporation, Respondents.**

**BRIEF OF ALUMINUM COMPANY OF AMERICA  
IN SUPPORT OF THE ISSUANCE OF A WRIT  
OF CERTIORARI.**

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\*UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, THE HONORABLE FRANCIS G. CAFFEY, Judge of the United States District Court for the Southern District of New York, and ALUMINUM COMPANY OF AMERICA, a Corporation, Respondents.

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Aluminum Company of America (hereinafter identified as "Alcoa") respectfully joins in the request that

\* The United States District Court for the Southern District of New York is listed as an additional respondent in the petition, but this is an inadvertence. The caption of the record as well as the motion in the Circuit Court of Appeals for writ of mandamus (R. 1) shows that Judge Caffey, but not the Court, was named as respondent. Alcoa intervened on leave granted (R. 336). No one has moved to add the District Court as a third respondent. We do not suggest the lack of a proper party, for Judge Caffey is still a member of the Court although in retired status and there appears to be no doubt that

a writ of certiorari issue in this case, on the ground that the Circuit Court of Appeals had jurisdiction to pass upon the merits of the motion for a writ of mandamus filed in that Court.

The Circuit Court of Appeals denied petitioner's motion for a writ of mandamus for lack of jurisdiction to entertain it (R. 358). We agree with the Government (certiorari petition, pp. 11-12) that the Circuit Court of Appeals was in error in so ruling, and that it had jurisdiction to decide the petition for mandamus (R. 1) upon its merits.

The petition for mandamus was based upon the asserted (and disputed) premise that the District Court was not carrying out the Circuit Court of Appeals mandate of March 28, 1945, and that the writ should issue in aid of this outstanding and only partially executed order of the Circuit Court of Appeals. Like the petitioner, we are persuaded that the appellate court was being asked to issue a writ of mandamus claimed to be in aid of its *past* appellate jurisdiction, which it had exercised in its opinion (148 F. 2d 416) and mandate (R. 15) of March 12 and 28, 1945.

The power of the Circuit Court of Appeals to entertain a petition for mandamus to protect its appellate jurisdiction (Judicial Code, §262, 28 U. S. C. §377) relates not only to *future* but also to *past* jurisdiction:

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his rulings are the law of the case. We mention the matter only because we feel that the District Court should not be treated in this summary manner. The inclusion of the District Court as a respondent in the recently filed motion for leave to file a mandamus petition in this Court (No. 303 Miscellaneous) has no counter-part in this case.

*Delaware, Lackawanna & Western Railroad Company v. Rellstab*, 276 U. S. 1 (1928, opinion by Mr. Justice Holmes).

Under the so-called Weaver act of June 9, 1944, c. 239, 58 Stat. 272, 15 U. S. C., §29, this Court was directed to certify to the appropriate Circuit Court of Appeals any case coming before it under the Expediting Act of February 11, 1903, c. 544, 32 Stat. 823, 15 U. S. C. §29, with respect to which a quorum of Justices was lacking in this Court. Such a certificate issued to the Circuit Court of Appeals for the Second Circuit in the case of *United States v. Aluminum Company of America et al.*, theretofore pending in this Court on a special docket at No. 2 October Term, 1943. Proceeding pursuant to the certificate, jurisdiction was exercised by the Circuit Court of Appeals (148 F. 2d 416); and as an attribute of that jurisdiction it has the power conferred upon it by §262 of the Judicial Code (28 U. S. C. §377) to protect and enforce the jurisdiction which it has already exercised. Under this *past* jurisdiction, the Circuit Court of Appeals decided all the issues between the plaintiff and Alcoa and as to the remedy, if any, deferred decision until after disposal of the Government-owned aluminum plants.

The Department's petition for the writ of mandamus is in aid of the appellate jurisdiction of the Circuit Court of Appeals which culminated in its mandate of March 28, 1945. The petition does not predicate jurisdiction on the *future* appellate jurisdiction of the Circuit Court of Appeals or of this Court. It could not, for nothing has been done that interferes with a full appellate review. For this reason we do not believe that the construction of the act of 1944 was properly before the Circuit Court of Appeals; nor do we believe that the inter-



pretation of this statute is involved in a review of that ruling on certiorari.

If jurisdiction to hear the motion for mandamus filed in the Circuit Court of Appeals depended in any way on the jurisdiction of that Court over a future appeal from the District Court with respect to matters remitted to it under the outstanding Circuit Court of Appeals mandate (R. 15), we should take the position that jurisdiction to hear the appeal vested in the Circuit Court of Appeals under the 1944 statute and the outstanding certificate of this Court. We do not believe that it was the intention of Congress to have this case shifted back and forth between two appellate courts. The inherent unworkability of having one segment of an anti-trust case passed upon with finality by one court and the balance by another, with neither free to review the other, makes such a construction quite improbable. However, there is no occasion to detail our position on that question of statutory construction until it arises.

It matters not to the jurisdiction of the Circuit Court of Appeals to entertain the pending petition for mandamus, whether the next appeal from the District Court lies to it or to this Court. That question is not raised on this record; and if it were, it could not be answered—regardless of the interpretation placed upon the so-called Weaver act—until the case was ripe for appeal, for only then will we know whether there is at that time on this Court a quorum of Justices qualified to hear the appeal. If not, appeal will plainly be to the Circuit Court of Appeals; while if a quorum then exists, the Weaver act must then be construed in order to determine which appellate court has jurisdiction. The statute need not be construed now; indeed it should not be, for there is nothing in the record to raise the issue.

Even if it be assumed that any further appeal from the District Court will lie only to this Court, the right of the Circuit Court of Appeals to entertain a petition for mandamus in aid of its *past* jurisdiction is clearly demonstrated by *Delaware, Lackawanna & Western Railroad Company v. Rellstab*, *supra*, 276 U. S. 1. In that case a judgment for the defendant in a personal injury case was affirmed by the Circuit Court of Appeals for the Third Circuit, but subsequently vacated by the District Court because of an affidavit by a witness confessing perjury. Thereupon the defendant petitioned the Circuit Court of Appeals for a writ of mandamus to require the District Court to reinstate the judgment which the Circuit Court of Appeals had previously affirmed. The Circuit Court of Appeals dismissed the petition for lack of jurisdiction, predicated upon the reasoning that if the judgment were reinstated no further appeal could be taken to the Circuit Court of Appeals with respect to it, and therefore the relief requested by mandamus could not be in aid of appellate jurisdiction. In short, the Circuit Court of Appeals held that, having no *future* appellate jurisdiction with respect to the judgment, it could not issue a writ of mandamus in support of its *past* jurisdiction. This decision was reversed by this Court, which ruled that the jurisdiction to issue a writ of mandamus existed to protect the appellate jurisdiction of the Circuit Court of Appeals which had previously been exercised. Mr. Justice Holmes, speaking for this Court, stated (p. 5):

"As the [District] Court was without jurisdiction to vacate the judgment [the term having expired], mandamus is the appropriate remedy unless to grant that writ is beyond the power of the Circuit Court of Appeals. \* \* \* We perceive no reason to

doubt the power of that Court. It had affirmed the judgment of the Court below. \* \* \* Like other appellate courts \* \* \* the Circuit Court of Appeals has power to require its judgment to be enforced as against any obstruction that the lower Court, exceeding its jurisdiction, may interpose. \* \* \* The issue of a mandamus is closely enough connected with the appellate power."

Having jurisdiction to enforce compliance with its outstanding mandate, the Circuit Court of Appeals should have decided the Government's motion for a mandamus upon the merits of the Department's contention that the District Court was not following the mandate.

We do not mean to imply any agreement with the Department on the merits of its claim that the District Court is not following the mandate. Indeed we think that it is perfectly clear that the trial court has faithfully carried out appellate instructions.

We deprecate the action of the Department in incorporating by reference into its petition for certiorari (at p. 8) its petition for mandamus and supporting brief filed concurrently in this Court at No. 303 Miscellaneous. These are detailed arguments on the merits of its motion for mandamus. We disagree with most of the assertions of fact and contentions of law thus incorporated. We could easily answer them, as we did in the Circuit Court of Appeals, but it is obviously inappropriate to discuss the merits at this time.

This proceeding for certiorari and the motion for leave to file a petition for mandamus in this Court at No. 303 Miscellaneous are inconsistent with each other. If one court has jurisdiction, the other has not.



**Summary.**

It is submitted, with deference, that the Circuit Court of Appeals so clearly had jurisdiction to rule the Government's petition for mandamus upon the merits of the contention that the District Court was proceeding in violation of the appellate mandate that it would be appropriate for this Court to issue a writ of certiorari and concurrently remand the case to the Circuit Court of Appeals for decision on the merits; and at the same time refuse the motion for permission to file a new petition for mandamus in this Court at No. 303 Miscellaneous. This appears to have been the disposition made in the comparable case of *Ex parte United States*, 319 U. S. 730 (1943, opinion per curiam).

Respectfully submitted,

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February 4, 1947.

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